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No. 94-1316

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nine *amicus* briefs have been filed in this case urging this Court to grant certiorari. These briefs, filed by the State of New York, by the New York Assembly's Joint Legislative Commission on the Dairy Industry, and by organizations representing interests as diverse as Farm Credit cooperatives, farm equipment manufacturers, farmers, ranchers, milk producers, and pork producers, attest to the critical importance to American agriculture of the issues presented in Southview Farm's petition.

The court of appeals has vastly expanded the reach of the CWA by effectively requiring New York's 9,700 dairy farms and, by extension, the approximately 140,000 dairy farms nationwide, to enroll—for the first time—in the CWA's permit program. Contrary to respondents' assertion (at 8)—and as the extraordinary range of *amicus* submissions clearly demonstrates—we do not "exaggerate" the reach of the court of appeals' decision. Almost all dairy farmers manure their fields with mechanical spreaders, almost all such spreading takes place near brooks, streams, gullies, or other potential "waters of the United States," and the threat of rain washing some of that manure into those waters is always present. See NY Leg. Comm'n *Amicus* Br. at 6.

With a stroke of the pen, then, the court of appeals has transformed manuring into a point source of pollution subject to an intricate and extremely burdensome scheme of federal regulation. Farmers, whose operating margins are inelastic and declining (see Northeast Dairy *Amicus* Br. at 6-8), are in no position to absorb the significant costs being thrust upon them by the court below. No wonder the State of New York maintains that the court of appeals' decision "threatens the economic viability" of that State's vital dairy industry. NY State *Amicus* Br. at 2.

Moreover, by redefining the term "point source" to encompass routine agricultural activities, the court of appeals has all but gutted the alternative, state-based regulatory scheme set forth in sections 208 and 319 of the CWA. Its

opinion thus severely disrupts the "'partnership between the States and the Federal government'" anticipated by the CWA. NY Leg. Comm'n *Amicus* Br. at 10 n.4 (quoting *New York* v. *United States*, 112 S. Ct. 2408, 2424 (1992)).

1. Respondents misconvey the procedural posture of this case. The district court determined *as a matter of law* that there was no point source discharge from Southview. Respondents' focus on the jury verdict is thus misplaced, because the jury's factual findings are not at issue.[1] What *is* at issue is the district court's legal judgment that a large dairy farm growing its own feed crops is not a CAFO and therefore is not a point source, that manure spreaders are not point sources, and that manure washed off a farm by heavy rains is an agricultural stormwater discharge and thus not a point source.[2] These are purely legal questions, about which farmers and state regulators had developed settled expectations that have now been destroyed by the court of appeals' countertextual reading of the CWA. It is fully appropriate, then, for this Court to correct the court of appeals' gross misconstruction of such an enormously important statute.

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[1] Respondents' "Factual Background"—which contains not a single citation to the record or to the opinions below—bears not the least resemblance to the facts upon which the Second Circuit relied in reaching its decision. For example, neither of the two opinions below so much as mention respondents' allegations that the manure spread on Southview's fields contained chlorine or phosphore acid washes (Resp. Br. at 6), or that Southview has an underground piping system (*id.* at 7), or that there was ever a rupture of those pipelines. *Id.* at 13 n.4.

[2] Respondents quote extensively—but irrelevantly—from pre-trial rulings of the district court. It is that court's post-trial Rule 50(b) ruling that represents its considered judgment on the legal questions at issue here. See Pet. App. 24a.

2. Respondents concede (at 14) that "most agricultural pollution is nonpoint source." They therefore try to squeeze Southview into the only exception to that rule written into the statute—the exception for CAFOs. But it is clear that Congress did not have dairy farms in mind when it legislated the CAFO exception. Rather, the term CAFO was designated for the assembly-line-like operations used to feed and fatten *beef* cattle. Am. Farm Bur. *Amicus* Br. at 12. CAFOs typically have animal-unit-to-acreage density ratios of at least 10 to 1 and often much higher. A good example is the CAFO in *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991), a case relied on by respondents (at 15), where 230 acres of land housed up to 30,000 head of cattle, a ratio of over 130 to 1! *Id.* at 1057. In contrast, Southview, a typical large dairy farm, has an animal-unit-to-acreage density ratio of only 1.35 to 1. Tr. 1947-1949. Congress's policy decision to subject the gargantuan beefing operations found primarily in western states (see Br. in Opp. at 17) to CWA permitting makes sense given the vast quantities of manure which they generate and which cannot be recycled. But that same concern does not implicate dairy farms like Southview, which can and do recycle their manure onto their own feed crop fields.

The regulatory exemption from CAFO designation for farms that grow crops over "any portion" of their facility is fully consistent with that policy concern. CAFOs are factories in the field and thus point sources; dairy farms like Southview devote large portions of their facility to growing feed crops and can thus internally accommodate their animal wastes.

3. Respondents imaginatively contend (at 16) that the term "lot or facility" in the regulatory definition of CAFO means the same thing as "confined area," so that EPA's substitution of the former (in its final regulations) for the latter (in its proposed regulations) means nothing. See 41 Fed. Reg. 11458 (1976). But the proposed regulations

certainly show that the agency knew how to say "area of confinement" when that is what it meant; by choosing the term "facility," it obviously meant something broader. *Cf. Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1448 (1994). In their ordinary, everyday senses, a dairy farm is a "facility" but not a "confined area," and a barn is a "confined area" but not a "facility." Southview, which produced 25,000 tons of crops and forage in 1992 (Am. Farm Bur. *Amicus* Br. at 13), unquestionably grows crops over a "significant portion" of its "facility" and therefore is not encompassed within the regulatory definition of CAFO.

Respondents (at 16) ascribe "no legal significance" to those many tons of crops because Southview's cows are not "pastured" in the crop fields. But dairy cows are *never* pastured in crop fields. As *amicus* State of New York explains (at 7):

> Corn stalks (corn is a typical animal feed on New York farms) averaging eight to ten feet when full grown, would ultimately be trampled by pasturing animals. It would also be impossible to separate the animal wastes from the crops, thereby preventing their use as animal feed.

Since, then, dairy cows can neither be pastured nor housed and fed (due to climactic conditions in the dairy belt) in crop fields, it would be impossible for any large dairy farm to satisfy respondents' construction of CAFO—unless it grew crops *in* its barns! This absurd result cannot possibly reflect the intent of Congress. *Cf. Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 454 (1989).

4. The CWA expressly exempts "agricultural stormwater discharges" from the definition of point source. 33 U.S.C. § 1362(14). Respondents seek to circumvent the fact that the alleged discharges on September 26 and April 15, made up of stormwater mixed with agricultural runoff, plainly fit within this exemption. They therefore urge (at 18-20) that the

exemption should apply only to "ordinary, natural" runoff, unmixed with pollutants. That would totally destroy the exemption, for such pure farm runoff is unlikely to exist in the real world of today. The EPA rule that permits are not required for "storm water runoff from * * * cultivated crops" (40 C.F.R. § 122.3) would similarly be rendered meaningless by respondents' purity requirement because cultivated crops are universally fertilized. Courts should not make decisions that render Congressional legislation and its implementing regulations meaningless. *Cf. John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) (statutory provisions should not "be construed in a nonfunctional way").

Respondents also repeat (at 18) the court of appeals' contention that regardless of the statutory language, the real issue is whether the jury could have found that the discharges were the result of over-application of manure rather than of heavy rains. Pet. App. 14a. Not only do they ignore the two uncontroverted reports by New York state environmental officials that "heavy rain" "caused" the manure runoff (Pet. App. 30a), but also the jury's finding of no liability on the state negligence and nuisance claims (Pet. App. 23a)—a highly unlikely verdict if the jury had viewed the discharges as resulting from over-application.

5. Respondents' efforts to bring manure spreaders and swales within the definition of point source are equally unavailing.

There are approximately 200,000 manure spreaders in the United States, yet neither EPA nor any state agency has ever issued a pollution discharge permit for a single one. Equipment Mfrs. *Amicus* Br. at 8. The fact is that no one (until now) has ever considered manure spreaders to be point source activity requiring a permit. The court of appeals has now overturned this settled understanding. Such a wholesale

revision of agricultural regulation should come from Congress, not a court.[3]

Respondents defend the court of appeals' invention of a new category of point source—a "swale"—by observing (at 11) that the CWA includes the term "ditch" in its definition of point source. But, as the district court found on the basis of photographic evidence, there was no "ditch" in the field at issue but only some "low spots." Pet. App. 46.[4] Congress included "ditch" within the definition of point source because a ditch, like the other terms in the definition, is the result of human activity, not, like a swale, a natural formation.[5] See R. Beck, *Waters and Water Rights* 216-217 (1991) (a "man-induced gathering mechanism plainly is the essential characteristic of a point source"). Contrary to respondents' position, Congress could not have intended the federal government to monitor natural movements of pollutants into and out of every uneven section of farmland. The CWA is aimed at the more monitorable and deterrable targets of industrial and municipal waste.

6. Respondents, like the court of appeals, would like to override Congress and intrude extensive federal permitting into the daily routines of American farmers. They rely

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[3] EPA agrees that manure spreaders are not point sources under the CWA. *Guidance Manual on NPDES Regulations for Concentrated Animal Feeding Operations* 2 (draft) (1995). But, unless the court of appeals is reversed, manure spreaders are now point sources, at least in the Second Circuit.

[4] Nor, contrary to the assertions of respondents (at 5, 11) and the court of appeals (Pet. App. 9a), is there *anything* in the record to indicate that the swale was coupled with a pipe.

[5] See *Merriam Webster's Collegiate Dictionary* (10th ed. 1994) (defining "ditch" as an excavation "dug" in the earth, and "swale" as "a low-lying or depressed and often wet stretch of land").

heavily (at 10) on *Natural Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977), which affirmed a district court's decision that Congress did not and EPA could not exempt most agricultural activities from the NPDES permitting program. But, astonishingly, respondents do not acknowledge that Congress was so appalled at the district court's decision in *Costle* that it responded by immediately amending three separate sections of the CWA, excluding "return flows from irrigated agriculture" from the definition of point source, exempting such return flows from the NPDES permit program, and assigning them instead to state and local regulators. See Pub. L. 95-217, 91 Stat. 1566 (1977). The Senate Report stressed that return flow pollutants, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(F)." S. Rep. No. 95-370, 95th Cong., 1st Sess. 35, reprinted in 1977 U.S.C.C.A.N. 4326, 4360 (referring to 33 U.S.C. § 1288, which delegates regulation of agriculturally related nonpoint source pollution to the states). Congress acted again in 1987 to reaffirm the unsuitability of federal permitting for agricultural runoff, expressly inscribing in the CWA that "[t]he term 'point source' * * * does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). The court of appeals' decision is an affront to these Congressional efforts to clarify that agricultural pollution is nonpoint source and appropriately regulated by state and local authorities.[6]

7. Finally, respondents fail to say anything at all about the damage done by the court of appeals' decision to the

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[6] *Costle* is thus bad law and inappropriately cited. The other cases relied on by plaintiffs (at 10-13) for their wildly expansive reading of "point source" either concern only industrial or municipal pollution or predate Congress's 1988 amendments expressly exempting agricultural stormwater discharges.

CWA's careful apportionment of regulatory responsibilities between the federal and state governments. In fact, they do not so much as mention sections 208 and 319 of the CWA, which assign to the states the regulatory authority over nonpoint sources of water pollution. *E.g.*, 33 U.S.C. § 1288(b)(2)(F) (requiring states to address agriculturally related nonpoint source pollution, including manure runoff). The CWA amendments of 1977 were expressly intended to encourage "the State[s] to assume more and more of the responsibilities of the water pollution program." S. Rep. No. 95-370, 1977 U.S.C.C.A.N. at 4357.

As *amicus* State of New York makes clear, the court of appeals' decision has thrown a wrench into the machinery of state regulation and is widely resented as an encroachment on a heretofore respected state preserve. This Court should grant Southview's petition to undo the incalculable damage being visited on farmers, the rural economy, and Congress's carefully considered regulatory blueprint for alleviating the dangers of water pollution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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